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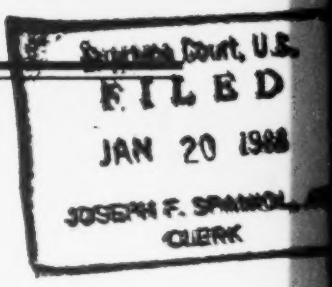

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD McCORKLE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

GERALD A. KROOP,
KROOP, KURLAND & ROSENBERG,
502 Court Square Building,
Baltimore, Maryland 21202,
(301) 547-1670,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED FOR REVIEW

1. Were the Petitioner's Fifth and Fourteenth Amendment Due Process rights violated when the lower court ruled that the photographic identification of Petitioner was reliable?
2. Was the Petitioner denied his Fifth and Fourteenth Amendment Due Process rights when the trial judge failed to hold a suppression hearing?

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

EDWARD McCORKLE

Petitioner

v.

STATE OF MARYLAND

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

OPINION OF THE COURT BELOW

The unreported per curiam opinion of the Court of Special Appeals of Maryland in McCorkle v. State, No. 1248, September Term, 1986, filed June 23, 1987, affirming Petitioner's conviction is reproduced in the Appendix (pp. 1-10).

The Order of the Court of Appeals of Maryland, McCorkle v. State, Petition Docket No. 336, September Term, 1987, filed November 20, 1987, denying Appellant's Petition for a Writ of Certiorari is reproduced in the Appendix (pp. 11)

STATEMENT OF JURISDICTION

The Order of the Court of Appeals of Maryland denying Appellant's Petition for a Writ of Certiorari was filed November 20, 1987. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257 (3) and the Rules of this Court, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

> indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1 (Citizenship Rights Not To Be Abridged By States):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 3, 1986, at approximately 6:00 p.m., Antonio Grant, Danny Grant, Barry Clark and Paul Webster entered a store in the 3800 block of Garrison Boulevard, in Baltimore City. Shortly thereafter, the Petitioner entered the store.

An argument began between Webster and Petitioner. The argument then moved outside the store to the street. At that time, Webster and the Petitioner were separated, and the four men then returned to Antonio Grant's parked car and left

the area.

After driving around for a short period of time, the car and its occupants emerged back on to Garrison Boulevard. At that time, Antonio Grant, the driver of the car, stated "There he goes." Danny Grant, the only one of the four men to testify at trial, did not see who Antonio Grant was referring to.

Three gunshots were heard at that time. All passengers ducked to the floor, and the driver, Antonio Grant, ducked down and sped away. Grant drove to his parents' home, informed them of the incident and returned to the scene to speak to the police.

Officer Bruno of the Baltimore City Police Department arrived at the scene at approximately 6:13 p.m. Antonio Grant approached the officer and explained the circumstances to him. Ultimately, Grant

was placed in the back of the police cruiser and shown a photo array of possible suspects. Grant chose the photo of the Petitioner.

At trial, which began on June 19, 1986 and concluded on June 23, 1986, Petitioner's counsel made an oral motion to suppress evidence and request for a hearing on the issue of the reliability and suggestiveness of the photographic array. After some discussion between the judge and Petitioner's counsel, it was agreed that the suppression would be held before the testimony of the police officer, during whose testimony the

photographic evidence would be introduced. However, no suppression hearing was held.

The photographic evidence was introduced, and the Petitioner was convicted of three (3) counts of attempted murder in the second degree. Sentencing was held on August 27, 1986, and Petitioner was sentenced to a twenty (20) year period of incarceration for each count to run concurrently. All but eighteen (18) months of the sentence were suspended.

Petitioner appealed to the Court of Special Appeals of Maryland, which affirmed the judgment of the trial court. His Petition for a Writ of Certiorari was denied by the Court of Appeals of Maryland.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Maryland has denied Certiorari on important questions of federal law decided by the Court of Special Appeals. These decisions are contrary to applicable decisions of this Court involving the Fifth and Fourteenth Amendments and the application of the exclusionary rule.

The Due Process clauses of the Fifth and Fourteenth Amendments mandate that photographic identifications, if they are to be used as substantive evidence in a criminal case, be reliable and not unnecessarily suggestive.

Additionally, those same Due Process clauses require that, when necessary and meritorious, suppression of evidence hearings be held to determine whether the exclusionary rule should be applied to suppress and exclude illegally gained

evidence as mandated by Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

In the case at bar, contrary to the mandates of the aforementioned Amendments, the Petitioner was never accorded a suppression hearing, although one was requested. As a result, photographic identification evidence was introduced at trial which the Petitioner contends were unreliable and suggestive and violated his due process rights.

As a result of these egregious actions by the trial judge in failing to hold a suppression hearing and allowing into evidence the photographic identification, the Petitioner was denied fundamental constitutional guarantees.

I. THE PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE LOWER COURT RULED THAT THE PHOTOGRAPHIC IDENTIFICATION OF THE PETITIONER WAS RELIABLE.

This Honorable Court held in Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968) that, in pre-trial identification cases, "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification'". It is the likelihood of misidentification which violates a defendant's rights to due process, and it is this which was the basis of the exclusion in Foster (Foster v. California, 394 U.S. 440 (1969)).

In Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), this Court stated that ". . . reliability is the linch pin in determining the admissibility of identification testimony . . ."

The reliability factors to be considered include: "(1) the opportunity of the witness to view the criminal at the scene of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation." Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In applying the reliability factors enumerated in Biggers, supra, several factors in the instant case must be addressed. First, the incident took place at approximately 6:00 p.m. on January 3rd, in the middle of winter. It was dark out at the time, and lighting was poor. Secondly, Antonio Grant, the identifying witness, was the driver of

the car with his attention focused on the road. Additionally, the description of the assailant which Grant gave to the police was extremely general. Finally, the time between the incident and the identification was approximately an hour.

These facts apply directly to four of the five Biggers reliability factors. The lighting conditions were poor and the witness was driving. These facts materially effect the opportunity of the witness to view the criminal at the time of the crime and the witness' degree of attention at the time of the incident. The description given the police was extremely general and materially effects the third criteria of the Biggers test, which is the accuracy of the witness' prior description of the criminal. Finally, the hour which elapsed between the incident and the identification

effects the fifth criteria of the test relating to the length of time.

It is clear that the reliability factors of Biggers have not been met. When combined with the fact that the identifying witness was not available at trial for cross examination; the reliability factors "as the linch pin in determining the admissibility" cannot be met under a totality of the circumstances test. There was a substantial likelihood of irreparable misidentification, denying the Petitioner due process of law, and the photographic identification should have been suppressed.

II. THE PETITIONER WAS DENIED HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WHEN THE TRIAL JUDGE FAILED TO HOLD A SUPPRESSION HEARING.

"There is no question that Due Process guarantees a meaningful hearing and procedures sufficient to ensure a

reliable determination of the facts underlying a motion to suppress". Jackson v. Denno, 378 U.S. 368, 376-77, 84 S.Ct. 1774, 12 L.Ed. (2d. 908 (1964)), United States v. Bergera, 512 F.2d, 391, 393 (9th Cir. 1975).

The command of Due Process is that the defendant be given a "hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

"Several aspects of the 'nature of this case' demonstrate why the trier of fact must necessarily have heard the evidence himself to guarantee the substantial rights of the defendant." United States v. Roddatz, 542 F.2d 976, 982-83 (7th Cir. 1979).

The nature of the right at stake dictates the degree of procedural

precaution due by the judicial system. In criminal cases, the procedural protections must be the greatest. (emphasis added) See, e.g., United States ex rel. Graham v. Mancusi, 457 F.2d 463 (2d Cir. 1972).

"The nature of the evidence necessary for decision inevitably must effect the type of procedures required to evaluate the evidence. It has been emphasized for decades that judicial fact finding must be designed to foster reliable determination of credibility." Wingo v. Wedding, 418 U.S. 461, 474, 94 S.Ct. 2842, 41 L.Ed. 2d 879 (1974); Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970).

The nature of the evidence in the instant case was a photographic identification, which the Petitioner contended was unreliable and

unnecessarily suggestive. Counsel made a motion to suppress the evidence and requested a hearing before trial actually commenced. The presiding judge agreed to hold the hearing not before trial but during the trial prior to the testimony of Officer Bruno.

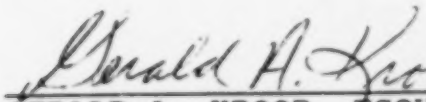
However, the Court failed to hold the hearing at the appropriate time, and the identification evidence and the accompanying testimony were admitted. Petitioner submits that the nature of the evidence required that a suppression hearing should have been held. The Petitioner was never accorded the protective hearing that the Due Process Clause mandates.

CONCLUSION

Based upon the aforementioned arguments, the Petitioner respectfully requests that this Honorable Court issue

a Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,



GERALD A. KROOP, ESQUIRE
Kroop, Kurland & Rosenberg
502 Court Square Building
Baltimore, Maryland 21202
(301) 547-1670
Attorneys for Petitioner

APPENDIX

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1248

September Term, 1986

EDWARD McCORKLE

v.

STATE OF MARYLAND

Bloom, Theodore G.
Bell, Robert M.
Pines, Joseph I., (specially assigned),

JJ.

PER CURIAM

Filed: June 23, 1987

A jury in the Circuit Court for Baltimore City convicted Edward McCorkle, the Appellant, of three counts of attempted murder in the second degree. The Honorable Solomon Baylor imposed sentences of twenty years in each case, to run concurrently, and suspended all but eighteen months of each. A motion for a new trial was denied and a timely appeal was filed.

We are asked to decide:

I. Whether, under the totality of the circumstances, the identification of Appellant by Antonio Grant was reliable.

II. Whether the trial court properly admitted statements of Antonio Grant, which were made immediately after the shooting.

III. Whether Appellant waived any

right to a suppression hearing on the photographic identification.

IV. Whether the trial court abused its discretion in refusing to grant a mistrial based on remarks made during the prosecutor's closing argument.

On January 3, 1986, at approximately 6:00 p.m., Antonio Grant, Danny Grant, Barry Clark and Paul Webster entered a store in the 3800 block of Garrison Boulevard, in Baltimore City. Shortly thereafter, Appellant McCorkle entered the store. An argument ensued between Webster and McCorkle, which then continued from the store, outside to the street. Antonio and Danny Grant and Barry Clark separated Webster and McCorkle and took Webster to Antonio

Grant's car which was parked nearby.

The four men entered the car and drove off. They drove for a short period of time and emerged back onto Garrison Boulevard, whereupon Antonio Grant, the driver of the car, stated, "There he goes." Danny Grant, the only one of the four men to testify at trial, did not see the person to whom Antonio Grant was referring. Three gunshots rang out. The passengers in the car ducked down and the driver, Antonio Grant, sped away. Antonio Grant drove to his parents' home, informed them of the incident, and returned to the scene to speak to the police.

Officer Bruno, of the Baltimore City Police Department, arrived at the scene at approximately 6:13 p.m. He interviewed Steven Hines, a passerby who

was struck in the thigh by one of the bullets. Antonio Grant approached the officer, explaining that someone had shot at this car. Grant was placed in the back of the police cruiser and shown a photographic array of possible suspects; Grant chose the photograph of Appellant. Appellant was subsequently arrested.

I.

Reliability of the Identification

Putting aside the State's contention that Appellant did not preserve the due process issue for appellate review, this is not the everyday, garden variety photographic identification. All witnesses knew the Appellant. They had known him for a number of years as "Tommy." The photographic identification was not for the purpose of suggesting to the witness the shooter's identity; it

was to inform the police of "Tommy's" identity. The police had a picture of someone they knew as "Tommy", and the photographic identification was merely to ascertain if the person the witness knew as "Tommy" was the same "Tommy" the police knew.

Immediately after the shooting, Antonio ran home and identified Appellant to both his father and sister. Additionally, Appellant, in three separate phone calls to Antonio's father, Reverend Samuel Grant, identified himself as the shooter. Even if the identification of Appellant by Antonio was unnecessarily suggestive--and we are not so deciding--Officer Bruno's testimony regarding Antonio's identification was merely cumulative and at best harmless error.

II.

Excited Utterance

The statements of Antonio Grant were properly admitted into evidence by the trial court under the excited utterance exception to the hearsay rule. There exists no precise formula to determine what lapse of time between the event and the declaration is sufficient to exclude an utterance. Monzone v. State, 294 Md. 692 (1982). Suffice it to say, Antonio Grant's statements were closely connected to the shooting and made at a time when he was still upset and in an excited state and properly admitted.

III.

Right to Suppression Hearing on Photographic Identification

Although Appellant failed to file a timely motion to suppress the

photographic identification under Md. Rule 4-252, the trial court, out of a sense of fairness, accorded Appellant a suppression hearing. That hearing centered on the hearsay aspects of the identification process. No testimony was taken as to whether or not the photographic identification process was suggestive. The trial court then granted the Appellant's request for a hearing on that issue; to take place at the time the witness appeared. However, counsel never asked for the hearing at the appropriate time and when reminded by the trial court, expressed the belief that it was "too late." The trial proceeded, the photograph was admitted with due deference to counsel's suggestion that the "mugshot aspect" of the photograph be eliminated. Under the circumstances, the

trial court did not err in admitting the photograph into evidence.

IV.

Refusal to Grant Mistrial

Appellant's counsel, in closing argument, stated that some of the passengers in the car at the time of the shooting did not appear as witnesses at the trial. The prosecution replied that the witnesses were frightened, to which defense counsel objected. The Judge offered to give the jury a curative instruction, which Appellant's counsel refused, saying: "I don't want any further instructions, mistrial or nothing. . ."

The request for a mistrial is addressed to the sound discretion of the trial court, Wilhelm v. State, 272 Md. 404, 429 (1974), which "in the exercise

of its discretion, should declare a mistrial only where there is manifest necessity for the act." Cornish v. State, 272 Md. 312, 317 (1974). The decision of the trial court denying the motion for a mistrial will not be overturned on appeal unless it is clear that there has been prejudice to the Defendant. Wilhelm, 272 Md. at 429.

The Court denied the motion for a mistrial. We see no abuse of discretion and, accordingly, affirm Appellant's conviction.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

EDWARD McCORKLE	*	IN THE
V.	*	COURT OF APPEALS
STATE OF MARYLAND	*	OF MARYLAND
	*	Petition Docket No. 336,
	*	September Term, 1987, (No. 1248,
	*	September Term, 1986, Court of
	*	Special Appeals)

* * * * * * * * *

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer and conditional cross-petition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no

showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: November 20, 1987